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In the Supreme Court of the United States

October Term, 1982

STATE OF OHIO, EX REL. HELEN EARNHART,
Petitioner,

vs.

OHIO POWER SITING BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED FOR REVIEW

Whether, consistent with the "quality of notice" dimension to the Fourteenth Amendment's Due Process Clause, a State's statutory scheme, regulating construction of major utility facilities, may permit selection of an electric transmission line's route to be made via public hearing held pursuant to constructive notice, by newspaper publication, to a resident-owner, across whose property the proposed line will pass, whose name and address are known or easily ascertainable.

PARTIES BELOW

Petitioner, State of Ohio ex rel. Helen Earnhart, Plaintiff-Relator below.

Respondent, Ohio Power Siting Board, fka Ohio Power Siting Commission, Defendant-Respondent below.

Ohio Edison Company, Intervening-Respondent below.

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No.

In the Supreme Court of the United States

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STATE OF OHIO, EX REL. HELEN EARNHART,
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OHIO POWER SITING BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

OPINIONS BELOW

There was no opinion delivered in the Court below.

JURISDICTION

The judgment of the Supreme Court of Ohio was dated and entered June 2, 1982. The Motion for Rehearing was denied per order dated June 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) and 28 U.S.C. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, to wit: Constitution of the United States, Amendment XIV, Section 1; Constitution of the State of Ohio, Article I, Section 19; and Ohio Revised Code (ORC) Sections 4906.01(B), 4906.04, 4906.06, 4906.07, 4906.10, 4906.12, 4903.10, 4903.11 and 4903.12, are set forth in Appendix *infra*, p. A5.

STATEMENT OF THE CASE

The Masury-Greenville Line ("Line") is a 138,000 volt electric transmission line, a "major utility facility" within the meaning of ORC 4906.01(B). The legislative purpose of ORC Chapter 4906, together with Respondent's administrative, due process responsibilities thereunder, are set forth in its Opinion and Final Order Granting a Certificate of Environmental Compatibility and Public Need With Conditions ("Certificate") reproduced, in pertinent part and with emphasis added, at Appendix, *infra*, p. A15.

When energized, the Line will affect the enjoyment of adjacent residential property in ways more tangible than the aesthetic repugnance to the sight of poles, wires and conductors. In its vicinity, the Line will produce electric and magnetic fields that, under certain weather conditions, emit audible noise; that cause some degree of radio and television noise interference; and "may induce perceptible charging current on very large objects under the line, such as a large truck." Through trimming and use of herbicides, maintenance of the Line

will affect vegetation. See Ohio Edison Company's *Site Report*, excerpts from which are reproduced at Appendix, *infra*, pp. A18-A21.

At all times relevant, and although an alternate route was and is still available, Line Section I was to have been constructed along a public right-of-way traversing Petitioner's residential real property abutting Miller Street, a rural highway in Trumbull County, Ohio. Petitioner lives in one of eleven houses located on Miller Street.

In May, 1977, Ohio Edison Company filed, with Respondent, its statutory application for the Line's Certificate; and thereafter complied with the constructive notice requirements of ORC 4906.06(B) and (C). The matter then proceeded to public hearing per the provisions of ORC 4906.07. On June 23, 1978, having never provided for Petitioner's personal notice of the application and hearing, although her name and address were known or, via public records, easily ascertainable, Respondent granted the application per ORC 4906.10(A). Subsequent applications to amend the Certificate were similarly filed and granted.

For want of actual notice of the filing and nature of the applications, and of the time and place for public hearing thereon, Petitioner did not thereat appear and testify relative to route selection for the Line. And, by the time she did learn of the existence and import of the Certificate, her opportunity to be heard on the matter had been extinguished per ORC 4906.12, 4903.10 and 4903.11.

On January 7, 1982, and by reason of the recourse strictures imposed by ORC 4903.12, Petitioner filed a Com-

plaint in Mandamus ("Complaint") in the Supreme Court of Ohio, invoking that Court's original jurisdiction to direct Respondent to provide her with actual notice of the filing and nature of the applications, and a meaningful opportunity to be heard on the matter of route selection for the Line; and to suspend the operation and effect of the Certificate, halting construction of the Line, lis pendens. In the Complaint, as grounds for mandamus, Petitioner raised the federal question of procedural due process guaranteed her under the Fourteenth Amendment to the United States Constitution.

On January 20, 1982, the Court allowed Petitioner an alternative writ in mandamus, suspending the Certificate's operation and effect, lis pendens. The Court then allowed Ohio Edison Company to intervene, as respondent. Thereafter, respondents below filed Motions to Dismiss and on June 2, 1982, after the parties had briefed the federal question raised, the Court sustained the motions and dismissed the Complaint, without opinion.

On June 30, 1982, in response to Petitioner's timely-filed Motion for Rehearing, the Court denied rehearing, without opinion.

Although the Line's construction has been or will soon be completed, Ohio Edison Company has not paid Petitioner compensation in money, or secured same by a deposit of money, a precondition of its ability to exercise condemnation powers under Article I, Section 19 of the Ohio Constitution.

ARGUMENT

A. The Supreme Court of Ohio Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be Settled by This Court.

Procedural due process, guaranteed under the Fourteenth Amendment to the U.S. Constitution, constituted the sole basis for Petitioner's Complaint in Mandamus below. The Supreme Court of Ohio dismissed that Complaint without opinion.

Where private, real property interests are affected by public expediency, the usual procedural due process considerations are adequate notice and meaningful opportunity to be heard on the matter of compensation for eminent domain "takings." *Bragg v. Weaver*, 251 U.S. 57, 64 L. Ed. 135 (1919); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 69 L. Ed. 953 (1925); and *Walker v. Hutchinson*, 352 U.S. 112, 1 L. Ed. 2d 179 (1956).

Herein, there are no eminent domain proceedings. Yet, state law permits Petitioner's cognizable, real property interest to become impaired without providing her with adequate notice of the vehicle of impairment—public hearing on the matter of route selection for the Line. *Infra.*

Petitioner submits that this Court has not, but should settle the question posed: the application of procedural due process safeguards to uncompensated public use impairment (not "taking") of private property.

B. The Supreme Court of Ohio Has Decided a Federal Question in a Way in Conflict With the Applicable Decisions of This Court.

As the titled owner of residential real property abutting, but whose fee, over which the Line was to have been

constructed and energized, extends to the centerline of Miller Street, a rural highway, Petitioner asserted a property interest that is recognized, protected and entitled to certain benefits under the laws of the State of Ohio. *Dailey, et al. v. State*, 51 Ohio St. 348 (1894); *Ohio Bell Telephone Co. v. Watson Co.*, 112 Ohio St. 385 (1925); *Callan v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166 (1902); and *Yoder v. Electric Co.*, 39 Ohio App. 2d 113 (C/A Franklin, 1974). Such interest is accordingly comprehended within the meaning of "property" under the procedural guarantees of the Fourteenth Amendment's Due Process Clause. *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548 (1972); and *Goss v. Lopez*, 419 U.S. 565, 42 L. Ed. 2d 725 (1975).

Herein, the procedural due process safeguards of Petitioner's interest must include notice and a meaningful opportunity to be heard, on the matter of route selection for the Line, prior to deprivation of that interest. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L. Ed. 865 (1950) and *Board of Regents v. Roth*, *supra*. As recently as *Greene v. Lindsey*, ... U.S. ....., 72 L. Ed. 2d 249 (1982), this Court opined:

> "The fundamental requisite of due process of law is the opportunity to be heard; furthermore, the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest, so that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Since Petitioner was entitled to such "reasonably calculated" notice of the Line's route selection proceeding, the final inquiry must be whether Ohio's statutory, constructive notice by newspaper publication, as opposed to personal notice to Petitioner, satisfied the "quality of notice" dimension to the due process clause. This inquiry is answered in the negative where, as here, Petitioner's name and address were known or easily ascertainable. See *Schroeder v. City of New York*, 371 U.S. 208, 9 L. Ed. 2d 255 (1962), citing *Mullane v. Central Hanover Bank & Trust Co., supra*, and quoting *New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 97 L. Ed. 333 (1953):

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice, ... Its justification is difficult at best."

See also, Walker v. Hutchinson, supra:

> "It is common knowledge that a landowner is rarely informed of proceedings against his property by mere newspaper publication."

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO ALLOWING APPLICATION FOR AN ALTERNATIVE WRIT

(Dated January 20, 1982)

No. 82-28

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO, EX REL. HELEN EARNHART,
Relator,

vs.

OHIO POWER SITING BOARD,
Respondent.

IN MANDAMUS

This cause originated in this court on the filing of a complaint for a writ of mandamus and upon consideration of the application of an alternative writ, pending final disposition of the cause by this court, it is ordered by the court that the application for an alternative writ be, and the same hereby is, allowed.

ORDER OF THE SUPREME COURT OF OHIO ALLOWING MOTION OF OHIO EDISON COMPANY FOR LEAVE TO INTERVENE AS RESPONDENT

(Dated January 27, 1982)

No. 82-28

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO, EX REL. HELEN EARNHART,
Relator,

vs.

THE OHIO POWER SITING BOARD,
Respondent.

ENTRY

This cause is pending before the court on the filing of a complaint for a writ of mandamus and upon consideration of the motion, filed by counsel for Ohio Edison Company, for leave to intervene as a respondent, it is ordered by the court that this motion be, and the same hereby is, allowed.

ORDER OF THE SUPREME COURT OF OHIO SUSTAINING MOTION TO DISMISS

(Dated June 2, 1982)

No. 82-28

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO, EX REL. HELEN EARNHART,
Relator,

vs.

OHIO POWER SITING BOARD *et al.*
Respondents.

IN MANDAMUS ON MOTION TO DISMISS

This cause originated in this court on the filing of a complaint for a writ of mandamus and was considered in the manner prescribed by law. On consideration thereof, it is ordered by the court that the motion to dismiss be sustained and cause dismissed.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Dated June 30, 1982)

No. 82-28

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO, EX REL. HELEN EARNHART,
Relator,

vs.

OHIO POWER SITING BOARD,
Respondent.

REHEARING

It is ordered by the court that rehearing in this case is denied.

CONSTITUTION AND STATUTES INVOLVED

United States Constitution

AMENDMENT 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution

Article I, Section 19

Private property inviolate, exception

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Ohio Revised Code

4906.01 Definitions

As used in Chapter 4906. of the Revised Code:

(A) "Person" means an individual, corporation, business trust, association, estate, trust, or partnership or any officer, board, commission, department, division, or bureau of the state or a political subdivision of the state, or any other entity.

(B) "Major utility facility" means:

(1) Electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more;

(2) An electric transmission line and associated facilities of a design capacity of one hundred twenty-five kilovolts or more;

(3) A gas or natural gas transmission line and associated facilities designed for, or capable of, transporting gas or natural gas at pressures in excess of one hundred twenty-five pounds per square inch.

"Major utility facility" does not include electric, gas, natural gas distributing lines and gas or natural gas gathering lines and associated facilities as defined by the power siting commission, nor gas or natural gas transmission lines over which an agency of the United States has exclusive jurisdiction.

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4906.04 Certificate for construction of major utility facility

No person shall commence to construct a major utility facility in this state without first having obtained a certificate for the facility. The replacement of an existing fa-

cility with a like facility, as determined by the power siting commission, shall not constitute construction of a major utility facility. Such replacement of a like facility is not exempt from any other requirements of state or local laws or regulations. Any facility, with respect to which such a certificate is required, shall thereafter be constructed, operated, and maintained in conformity with such certificate and any terms, conditions, and modifications contained therein. A certificate may only be issued pursuant to Chapter 4906. of the Revised Code.

A certificate may be transferred, subject to the approval of the commission, to a person who agrees to comply with the terms, conditions, and modifications contained therein.

4906.06 Application for certificate; contents; publication of notice; amendment

(A) An applicant for a certificate shall file with the power siting commission an application, in such form as the commission prescribes, containing the following information:

(1) A description of the location and of the major utility facility to be built thereon;

(2) A summary of any studies which have been made by or for the applicant of the environmental impact of the facility;

(3) A statement explaining the need for the facility;

(4) A statement of the reasons why the proposed location is best suited for the facility;

(5) A statement of how the facility fits into the applicant's forecast contained in the report submitted under section 1551.17 of the Revised Code;

(6) Such other information as the applicant may consider relevant or as the commission may by regulation or order require. Copies of the studies referred to in division (A)(2) of this section shall be filed with the commission, if ordered, and shall be available for public inspection.

The application shall be filed not less than two years, except one year in the case of transmission lines, nor more than five years prior to the planned date of commencement of construction. Such period may be waived by the commission for unforeseen emergencies.

(B) Each application shall be accompanied by proof of service of a copy of such application on the chief executive officer of each municipal corporation and county and the head of each public agency, charged with the duty of protecting the environment or of planning land use, in the area in which any portion of such facility is to be located.

(C) Each applicant shall within seven days of the filing of the application give public notice to persons residing in the municipal corporations and counties entitled to receive notice under division (B) of this section, by the publication of a summary of the application in newspapers of general circulation in such area. Proof of such publication shall be filed with the commission.

(D) Inadvertent failure of service on, or notice to, any of the persons identified in divisions (B) and (C) of this section may be cured pursuant to orders of the commission designed to afford them adequate notice to enable their effective participation in the proceeding. In addition, the commission may, after filing, require the applicant to serve notice of the application or copies thereof or both upon such other persons, and file proof thereof, as the commission considers appropriate.

(E) An application for an amendment of a certificate shall be in such form and contain such information as the commission prescribes. Notice of such an application shall be given as required in divisions (B) and (C) of this section.

4906.07 Hearing on application; fixing date; investigation; written report

(A) Upon the receipt of an application complying with section 4906.06 of the Revised Code, the power siting commission shall promptly fix a date for a public hearing thereon, not less than sixty nor more than ninety days after such receipt, and shall conclude the proceeding as expeditiously as practicable.

(B) On an application for an amendment of a certificate, the commission shall hold a hearing in the same manner as a hearing is held on an application for a certificate if the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application.

(C) The secretary of the power siting commission shall investigate each application filed with the commission and shall, not less than fifteen days prior to the date any application is set for hearing submit a written report to the commission and to the applicant. A copy of such report shall be made available to any person upon request. Such report shall set forth the nature of the investigation, and shall contain recommended findings with regard to division (A) of section 4906.10 of the Revised Code and shall become part of the record and served upon all parties to the proceeding.

4906.10 Granting or denying certificate; period of initial operation; conditional certificate

(A) The power siting commission shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the commission considers appropriate. The certificate shall be conditioned upon the facility being in compliance with standards and regulations adopted under Chapters 3704., 3734., and 6111. of the Revised Code. The period of initial operation, under a certificate, shall expire two years after the date on which electric power is first generated by the facility. During the period of initial operation the facility shall be subject to the enforcement and monitoring powers of the director of environmental protection under Chapters 3704., 3734., and 6111. of the Revised Code and to the emergency provisions thereunder. If a major utility facility constructed in accordance with the terms and conditions of its certificate is unable to operate in compliance with all applicable requirements of state laws, regulations, and standards pertaining to air pollution, such facility may apply to the director of environmental protection for a conditional operating permit under division (G) of section 3704.03 of the Revised Code and the regulations adopted thereunder. The operation of a major utility facility in compliance with such a conditional operating permit is not in violation of its certificate. After the expiration of the period of initial operation of a major utility facility, such facility shall be under the jurisdiction of the environmental protection agency, and shall comply with all laws, regulations, and standards pertaining to air pollution, water pollution, and solid waste disposal.

The commission shall not grant a certificate for the construction, operation, and maintenance of a major utility

facility, either as proposed or as modified by the commission, unless it finds and determines:

(1) The basis of the need for the facility;

(2) The nature of the probable environmental impact;

(3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In case of an electric transmission line, that such facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems; and that such facilities will serve the interests of electric system economy and reliability;

(5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all regulations and standards adopted thereunder;

(6) That the facility will serve the public interest, convenience, and necessity.

(B) If the commission determines that the location of all or a part of the proposed facility should be modified, it may condition its certificate upon such modification, provided that the municipal corporations and counties, and persons residing therein, affected by the modification, shall have been given reasonable notice thereof.

(C) A copy of the decision and any opinion issued therewith shall be served upon each party.

4906.12 Applicability of PUCO Statutes

Sections 4903.02 to 4903.16 and sections 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding

or order of the power siting commission under Chapter 4906. of the Revised Code, in the same manner as if the commission were the public utilities commission under such sections.

4903.10 Rehearing

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in said proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers said order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in said application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order shall, unless otherwise ordered by the commission, be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by registered mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

Where the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, which will be taken, but it shall not upon such rehearing take any evidence which, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of said order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

4903.11 Notice of appeal from order of commission

No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing. An order denying an application for rehearing or an order made after a rehearing shall be served forthwith by registered mail upon all parties who have entered an appearance in the proceeding.

4903.12 Review only by supreme court

No court order other than the supreme court shall have power to review, suspend, or delay any order made

by the public utilities commisson, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

EXCERPT FROM CERTIFICATE OF RESPONDENT

• • • • •

E. *SUMMARY OF THE COMMISSION'S DECISION*

The Commission has decided to grant the Ohio Edison Company's application for a Certificate of Environmental Compatibility and Public Need for the Masury-Greenville facility. We agree with the recommendations and conclusions of the Administrative Law Judge and the Secretary and are approving the stipulation of the parties (ICN 57).

In our judgment, each of the criteria listed in Section 4906.10(A) of the Revised Code has been met for the proposed line. To the extent that concerns have been raised about impacts from the line, we have included conditions herein where it was felt necessary. We are, therefore, issuing this Certificate to the Ohio Edison Company.

F. *THE COMMISSION'S RESPONSIBILITIES UNDER CHAPTER 4906. OF THE OHIO REVISED CODE*

Chapter 4906. of the Ohio Revised Code is a response to the dilemma posed by society's growing needs for energy, on the one hand, and its concern for safeguarding the natural, social and economic environment on the other. These needs for energy are bound up with population

growth, rising standards of living expectations and the high levels of technology and economic productivity such expansion requires. Were there to be a sustained shortage of power, the cost to society would not be simply the loss of comforts or amenities, but losses in opportunities and subsequent jeopardy to an improving standard of living for Ohio's citizens. Yet the production and transmission of electricity, by any means now available, inevitably take some toll on the environment, and in the absence of concerned and farsighted planning, may work profound injury. No perfect solution to the problem is yet in view. And even the imperfect measures proposed still add in some degree to the costs consumers must bear. These problems, of national and wider scope, are not confined to any one locality or electric power system; rather, they affect the entire state and reach beyond its limits into the national power grid.

The electric utility systems of the state are linked in a network, which in turn is joined to systems in neighboring states and regions. The creation of this transmission grid has increased the reliability of power supply wherever the network reaches and, by making the power surplus of any interconnected system available to other areas, and by pooling reserves, it has helped to slow the rate at which generating plants-and their attendant environmental impacts-must be added to the overall system. When plants are built, moreover, the network permits them to be sited at locations which minimize environmental impact and maximize economies of production. The power network depends, however, upon a sufficient system of high energy transmission lines. Thus, to the general considerations already mentioned, are added the legitimate concerns of the officials and residents of communities through which power lines must pass.

It is apparent that in 1972, the Ohio Legislature recognized that decisions involving interests as complex and diverse as those attending the location of utility generating plants, transmission lines, and the associated facilities of both could more properly be made only by an agency having statewide jurisdiction and an informed overview of the entire subject matter. *It concluded, moreover, that the proceedings would best be conducted in a single forum, where all parties, both public and private, could be heard, and where the interrelationship of all the issues would be apparent. In this way, decisions could be reached which appropriately balanced the viewpoints and interests of all constituencies over the full range of issues in each case.*

Accordingly, Chapter 4906. of the Revised Code provides that no "major utility facility" may be constructed in Ohio unless the Power Siting Commission has first issued a "certificate of environmental compatability and public need" (Revised Code Section 4906.04). *The Commission may issue such a certificate only after a hearing with respect to which opportunity to participate shall have been afforded to affected municipalities, counties, public agencies charged with protecting the environment or of planning land use, residents of the affected areas, and any other persons (for good cause shown).*

EXCERPTS FROM OHIO EDISON COMPANY SITE REPORT

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3. *Operation*

Transmission line audible noise is primarily a foul weather phenomena occurring during rain, snow, or fog. At voltages of 345-kV and below, conductor selection to meet load-carrying capacity and radio interference requirements results in audible noise levels barely perceptible at ground level.

Background noise levels have a significant effect upon noise tolerances. Transmission line audible noise is perhaps most noticeable during fog or high humidity conditions. During heavy rains, line noise may be less noticeable because of the higher background noise level.

The degree of annoyance with radio and television noise interference is expected to be within an acceptable range to the public. There should be no broadcasting pattern distortion. The radio and television broadcasting towers have been located, and none exist within 3/4 miles of the proposed lines.

• • • • •

3. *Electrical Effects*

a. *Induced and Conducted Charges* - A thorough analysis of the production of audible noise and radio and television interference was presented under Section PSC-15-04, and ozone was discussed in Section PSC-15-04. Discussion here concerns induced and conducted charges.

The transmission line will produce electric and magnetic fields in its vicinity, as do all power lines

regardless of voltage. In the event of line faults to ground, current will also travel through the earth in order to return to the source. Currents induced in objects near the line from the line magnetic field, or faults returning through the earth, will reach measurable levels only during system faults, which will be cleared by circuit breakers in a fraction of a second.

The electric field under the line will continuously induce small electric currents in conducting objects underneath the line conductors. The magnitude of these currents is a function of both the electric field intensity near the ground under the line and the size of the object in which currents are induced.

The maximum electric field intensity at the edge of the right-of-way at 4 feet from the ground is approximately 500 volts per meter with the maximum intensity under the line being 700 volts per meter. These are low field intensities but may induce perceptible charging current on very large objects under the line, such as a large truck.

From experience, fences are not normally influenced by the induced voltage with lines of this voltage. Any complaints to the Ohio Edison Company regarding annoyances from induced voltages will be investigated by the company.

C. Ecological Impact

1. *Biota*

The disruptions of biota by construction, operation and maintenance activities on the preferred or alternate route will occur primarily on agriculture and forest land.

Streams within the right-of-way may receive minor effects from construction. This would occur when crossing them and may cause short-term increases in turbidity. Water runoff from clearing activity will be little if any increase above normal.

In Line Section I where the area is mostly classified as urban the vegetation in front of homes will mostly be trimmed for construction and maintenance. Little species change will take place because of the transmission line. Wildlife in this area is mostly associated with human habitats and consists of sparrows, starlings, pigeons, songbirds, rats, mice, feral dogs and cats, rabbits and squirrels. They are not expected to be affected by activities of construction, maintenance or operations of the transmission line.

2. *Stripping of Vegetative Cover*

Vegetation will be cut or sheared close to the ground. This will cause less soil disturbance than grubbing methods, and allow some of the soil cover to remain. (See Section 15-02.)

3. *Herbicides*

To control the many plant species found on the various sites along the right-of-way, a number of herbicides and application methods will be used. In selecting a herbicide and its application method, consideration is given to the species to be controlled, its size, density, reproductive habits, time of application, and the susceptibility to the herbicide, the site and sensitive crops in the area. In addition, the herbicide is also considered for its selectivity, persistence, toxicity, and its Federal EPA Registered Label Instruction and uses.

Several methods of application are normally used along the right-of-way. The five major brush treatments are:

the application of foliage sprays, which is best for treating dense stands of brush; basal sprays, for treating less dense stands or tall trees where aerial application should be avoided; cut surface treatment; stump application where species need to be cut; and soil applications for herbicides that are taken up through root absorption.

• • • • •

Relative impact of the transmission line depends on the various types of land use. Impact will occur when the line changes access or use of adjacent land. Impact also occurs when the presence of the line affects the enjoyment of residential values.

In the case of both Routes A and B, Line Sections I and II are virtually the same. There would be no changes in access or the use of adjacent lands.

In Line Section III there would be little effect on access or use of adjacent lands since access to the right-of-way can be directly from existing public highways.

However, in Line Section I some impact as to enjoyment of the use of adjacent residential land areas would be possible, but no more objectionable than the existing facilities now located along the public thoroughfare. In the case of Line Section II this would be no problem since the line is an addition to one side of an existing tower line.

• • • • •

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CASE NO. 82–542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF OHIO, EX REL.
HELEN EARNHART,

Petitioner,

v.

OHIO POWER SITING BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE STATUTORY PROCESS FOR DETERMING WHERE MAJOR UTILITY FACILITIES MAY BE SITED IN OHIO HAS AFFECTED ANY COGNIZABLE PROPERTY INTEREST OF PETITIONER IN A MANNER SUCH THAT THE PROCEDURAL DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION HAVE BEEN VIOLATED.

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A. The decision of the Ohio Power Siting Board as to where a major utility facility may be located does not in and of itself authorize the installation of such a facility at said location. Hence, the decision of the Power Siting Board does not affect any property interest of Petitioner 3

B. Under Ohio Law, the installation of an electric transmission line in a highway right-of-way does not constitute an additional burden upon the abutting

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property. Hence, under the facts of instant case, no cognizable property right of Petitioner has been impaired and therefore, no Fourteenth Amendment due process rights of Petitioner have been violated 5

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STATEMENT OF THE CASE

The following is presented in amplification of Petitioner's Statement of the Case:

The Masury-Greenville Line is a 138,000 volt electric transmission line. It is approximately seventeen miles long extending from Ohio Edison Company's Masury Substation in Masury, Ohio to Pennsylvania Power Company's Greenville Substation in Greenville, Pennsylvania.

To comply with Sections 4906.06(B) and (C) of the Ohio Revised Code, Ohio Edison published "Notice of the Proposed Facility" with accompanying route map in both the *Youngstown Vindicator* and the *Sharon News-Herald* on August 15, 1977, and again on December 2, 1977, placed copies of its Application in the Warren Public Library, Trumbull County, and served copies of the Applications on a number of local officials including the Trumbull County Commissioners, the Brookfield and Hartford Township Trustees, and the Trumbull County Planning Commission.

On June 23, 1978, after the public notice described above was published and after holding two public hearings and after considering the case record, Respondent, Ohio Power Siting Board, issued a Certificate of Environmental Compatibility and Public Need to Ohio Edison Company for its Masury-Greenville Transmission Line. (Petitioner admits that the statutory notice and hearing provisions were complied with by Respondents).

The Board's decision to issue the Certificate included a finding that the Masury-Greenville Transmission Line was needed in order to avoid overloaded lines in northeastern Ohio and northwestern Pennsylvania. It also included a finding that the route certificated by the

Board represented the minimum adverse environmental impact considering the alternatives available and a finding that construction of the line was in the public interest.

The Certificate issued by the Power Siting Board to Ohio Edison for the Masury-Greenville Line applies only to that part of the line that is in Ohio. The Ohio part of the line is approximately ten miles long and extends from the Masury Substation to the point south of Orangeville, Ohio where the line crosses the Ohio-Pennsylvania border. Construction of the Masury-Greenville Line has been completed. All poles have been installed and the wire strung on all segments of the line, including the segment on Miller Street immediately adjacent to the Masury Substation where the Petitioner resides.

SUMMARY OF ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT

Petitioner's arguments that the process whereby the Ohio Power Siting Board certificated Ohio Edison Company's Masury-Greenville Transmission Line violated her Fourteenth Amendment due process rights fail for several reasons. Her arguments fail initially because Petitioner did not establish two critical threshold facts. First, Petitioner does not, as she cannot, establish that the process whereby major utility facilities are sited in Ohio directly "impairs" the property of any owner on the route where the power plant or line is permitted to be located. Second, under Ohio law and the facts of the instant case, Petitioner has no cognizable property interest that has been "impaired" by the installation of the Masury-Greenville Line in the road right-of-way on Miller Street.

Finally, even if the Constitutional issue raised is reached, long-standing and well established decisions of this Court make clear that Petitioner's due process rights

have not been violated by the Ohio Power Siting Board. This Court has consistently held that the kind of decision made by the Ohio Power Siting Board, namely, the need for and the proper extent of land needed for a public purpose (in the instant case an electric transmission line), does not require any notice to potentially affected landowners. Hence, Petitioner's allegation of unconstitutionality should be rejected by this Court.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

THE STATUTORY SCHEME IN CHAPTER 4906 OF THE OHIO REVISED CODE FOR THE SITING OF MAJOR UTILITY FACILITIES, INCLUDING PROVISION FOR HEARINGS HELD PURSUANT TO CONSTRUCTIVE NOTICE BY NEWSPAPER PUBLICATION, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The decision of the Ohio Power Siting Board as to where a major utility facility may be located does not in and of itself authorize the installation of such a facility at said location. Hence, the decision of the Power Siting Board does not affect any property interest of Petitioner.

It is elemental that before the procedural due process rights of the Fourteenth Amendment to the United States Constitution become applicable to a process, such process must be capable of resulting in the deprivation of a person's property. Sections 4906.04 and

4906.98 of the Ohio Revised Code prohibit a person from constucting and operating a major utility facility without a certificate therefor from the Ohio Power Siting Board. Hence, certification only results in the elimination of the prohibition.* It clearly does not alter the fundamental principle that the certificate holder may not construct the proposed facility on land that it does not own or on land where it does not have the permission of the landowner.

Moreover, the Ohio Power Siting Board has no eminent domain authority. Although electric utility companies have been given the power of eminent domain to appropriate any land or interest therein as is deemed necessary for the operation of their facilities (Section 4933.15 of the Ohio Revised Code), certification by the Board does not give a utility any special status for eminent domain purposes. Hence, it is clear that Board certification of the need for such a facility and Board certification of where such facility may be located, does not result in the deprivation of any person's property.

In making her argument that the process whereby the Power Siting Board decides where a major utility facility may be located infringed upon her Constitutional due process rights, Petitioner simply ignores the above-described limited nature of the Power Siting Board's process. Petitioner does not explain how the Board's decision as to where a major utility facility may be located "impairs" her property. Hence, Petitioner's argument fails as Petitioner has not established the

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* Section 4906.13 of the Ohio Revised Code provides that certification of a project does preclude certain other agencies and political subdivisions from requiring additional approvals for the project.

critical nexus between the Power Siting Board's process and the alleged "impairment" to her property.*

B. Under Ohio law, the installation of an electric transmission line in a highway right-of-way does not constitute an additional burden upon the abutting property. Hence, under the facts of the instant case, no cognizable property right of Petitioner has been impaired and therefore, no Fourteenth Amendment due process rights of Petitioner have been violated.

Assuming arguendo that the power siting process under Chapter 4906 of the Ohio Revised Code can result in the deprivation of a person's property, Petitioner still cannot assert any violation of her due process rights because under the facts of the instant case, no cognizable property interest of Petitioner has been "impaired."

Petitioner claims that as an abutting property owner, Petitioner has a property interest in the road right-of-way that is "recognized, protected and entitled to certain benefits under the laws of the State of Ohio." While that may be true as a general statement, it is well settled under Ohio law that the installation of an electric transmission line in the public highway right-of-way does not constitute an additional burden upon the abutting property. *Smith v. Central Power Co.*, 103 Ohio St. 681, 137 N.E. 159

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* It is arguable that Petitioner has conceded this point as Petitioner in her Statement of the Case states that "although the Line's construction has been. . .completed, *Ohio Edison Company* has not paid Petitioner compensation in money, . . .a precondition of *its ability to exercise condemnation powers*. . ." (emphasis added).

(1921) (The installation of electric lines in a road right-of-way did not impair the property interest of abutting owner); *Franko v. Ohio Edison Co.*, 71 Ohio Law Abs. 221, 130 N.E. 2d 383 (Ct. App. Mahoning Cty., 1954), *appeal dismissed,* 162 Ohio St. 244, 122 N.E. 2d 792 (1954) (Where a street has been dedicated for the use of the public, the only limitation upon a public utility is that the poles shall not interfere with the abutting property owner's rights of access, light, air and view); *Walton v. The Cincinnati, Milford & Blanchester Traction Co.*, 17 Ohio App. 34, 20 Ohio L. Rep. 632 (Clermont Cty., 1922) (The prior approval of an abutting property owner is not required for the installation of an electric line in the road right-of-way); *Huss v. Toledo Railways & Light Co.*, 25 Cir. Ct. Rep. (n.s.) 44, 26 Cir. Dec. 181 (Ct. App. Lucas Cty., 1915) (The erection and maintenance of an electric line in a street right-of-way does not invade the rights of an abutting property owner). *See also The Ohio Postal Telegraph-Cable Co. v. Smith et al.*, 128 Ohio St. 400, 191 N.E. 698 (1934) (The location of telephone poles within the limits of a highway is not an additional burden upon the easement nor an invasion of the property rights of an abutting owner); *Heck v. General Telephone Co.*, 72 Ohio Op. 2d 146 (C.P. Montgomery Cty., 1975) (The poles and lines of a telephone company do not constitute an additional burden and servitude upon the abutting property for which the owner is entitled to compensation when such facilities are located wholly within the boundaries of an easement granted by the abutting property owner for highway purposes).

In *Central Power Co., supra,* in holding that the installation of an electric line in a highway did not constitute an additional burden on an abutting property, the concurring opinion of Chief Justice Marshall states:

> *The evolution of public utilities and the widespread and ever-increasing use of*

public utility service throughout the state have greatly varied the uses of the streets and highways. It is doubtful whether this great variety of uses has really increased the burdens. . . .It has been found more economical as well as more speedy to transport merchandise and passengers by rail, to convey electrical energy for light, heat and power and to transmit messages and information by wires, and to convey gas for fuel and lighting and water for municipal purposes by pipe lines, and other utilities by still other and different methods. It is hardly correct to say that by such new adaptations the streets and highways are subjected to uses not contemplated when highways were laid out many years ago. *It would be more correct to say that present uses are the progression and modern development of the same uses and purposes.* . . .

It is also a significant fact that a large part of the cost and expense of improvement of the streets and highways is paid out of public funds. *The public should therefore be entitled to an amplified use of that which it has furnished material aid in improving.* . . .

As civilization has progressed, specialization has also progressed, and now nearly all the wants of human-kind are the subject of interchange and traffic. The resulting commercial intercourse has by a process of evolution almost bordering on revolution made our streets and highways those busy arteries of com-

> merce, and has given rise to such suits as the case at bar. Some of our courts have not kept step with the procession, while *others have adopted and followed that broader view of the relation between the abutting property rights and the adjacent highway easements and privileges [that certain new uses of a road right-of-way do not constitute an increased burden upon abutting property].* Surely *the latter line of decisions has correctly sounded the true doctrine* (emphasis added). 103 Ohio St. at 692-95.

The Ohio Supreme Court in *Ziegler v. Ohio Water Service Co.*, 18 Ohio St. 2d 101, 247 N.E. 2d 728 (1969), reaffirmed the *Central Power Co.* holding as to the broad uses permitted in a highway right-of-way. In *Ziegler* the Court held that the construction and maintenance of an underground water pipeline in the highway right-of-way did not constitute an added burden on the abutting property for which compensation must be awarded. In so holding, the Court stated:

> The question in the instant case is whether the intended use of the land, subject to the easement of the state for a highway, is an added burden on plaintiff's property.
>
> Obviously, highways are primarily for the use of the public, in traveling from place to place. Although modern-day travel on our highways is predominately by motor vehicle, *highways certainly are not limited to such use. The effect of the use of a highway upon abutting land has always been variable and subject to change. The complexities of modern life*

> *have produced uses of highways which would have been unheard of at the time many easements for public highways were granted.*
>
> We are unable to discern any substantial burden visited on plaintiff's property by the intended construction. *A denial of the use of a highway for the purpose of transporting water to areas where it is needed, as in the instant case, would be the rejection of evolutionary change.* See 5 Restatement of the Law, Property, Section 479. We therefore hold that the construction of water pipes in real property, for which an easement for highway purposes has been given, is not an added burden on such land, for which the owner must be compensated (emphasis added). 18 Ohio St. 2d at 105-106.

Hence, it is clear that the Ohio courts have adopted a broad and progressive view as to what uses are permitted in a highway right-of-way. Specifically, Ohio courts have held that the installation of an electric line in a highway right-of-way does not constitute an additional burden upon an abutting property for which an owner is entitled to compensation. Under Ohio law then, Petitioner has no cognizable property interest that has been affected because Petitioner is claiming an "impairment" solely based upon the construction of an electric transmission line in a road right-of-way and her status as an abutting property owner. As a result no Fourteenth Amendment due process rights of Petitioner have been violated.

To the extent that the cases cited by Petitioner on this issue hold that the installation of an electric line

in the highway right-of-way constitutes an additional burden on the abutting property, such cases were overruled by the more recent *Central Power Co., supra,* and *Ziegler, supra,* opinions of the Ohio Supreme Court. *Central Power Co., supra,* expressly overruled *Callen v. Columbus Edison Electric Light Co.,* 66 Ohio St. 166, 64 N.E. 141 (1902), one of the cases cited by Petitioner. 103 Ohio St. at 703.

C. Under applicable and well established case law, the State of Ohio is under no Constitutional obligation to give Petitioner or any other similarly situated person any notice of a hearing to determine where a major utility facility may be located.

Even assuming arguendo that the construction of the electric transmission line in the highway right-of-way adversely affected a property interest of Petitioner and assuming there exists some undefined connection between Chapter 4906 of the Ohio Revised Code and Ohio eminent domain law, the Board was, nevertheless, under no obligation to give Petitioner any notice of the hearing that considered the location of said line.

The Board is under no obligation to give Petitioner any notice of such a hearing because no notice is required to be given for the kind of decision that the Power Siting Board makes, namely, the necessity for and the proper extent of land needed for a public purpose (an electric transmission line). This is true even if a utility finds it necessary to invoke its eminent domain powers to secure the land where the Board has indicated the line may be located.* *North Laramie Land Co. v. Hoffman,* 268

*Under Ohio eminent domain law, Petitioner would, of course, be entitled to notice and a hearing in connection with an appropriation proceeding. *See* Section 163.07 of the Ohio Revised Code.

U.S. 276 (1925); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668 (1923); *Bragg v. Weaver*, 251 U.S. 57 (1919); *Sears v. City of Akron*, 246 U.S. 242 (1918); *Joiner v. City of Dallas*, 380 F. Supp. 754 (N.D. Tex. 1974), *affirmed* 419 U.S. 1042, *reh. den.* 419 U.S. 1132 (1975); *Government of the Virgin Islands v. 19.623 Acres of Land*, 536 F. 2d 566 (3rd Cir. 1976).

In *North Laramie, supra*, this Court stated that "the necessity and expediency of the taking of property for public use 'are legislative questions, *no matter who may be charged with their decision*, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment'" (emphasis added). 268 U.S. at 284.

In *Joslin Mfg. Co., supra*, this Court held:

> The validity of the act is challenged as denying due process of law, on the ground that the question of the necessity for taking the property has not been determined by the Legislature itself, but is relegated to the city to decide ex parte, without appeal or opportunity for hearing and decision by an impartial tribunal. That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. . . .*The question [necessity]* is purely political, *does not require a hearing, and is not the subject of judicial inquiry* (emphasis added). 262 U.S. at 678.

In *Bragg* this Court stated that "where the intended use is public, *the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate.* They are legislative questions,

no matter who may be charged with their decision. . ." (emphasis added). 251 U.S. at 58.

Petitioner cites no case that limits or distinguishes the above-cited holdings of this Court. Instead, Petitioner simply assumes that notice is required and cites this Court several cases that discuss the quality of notice required for due process. Such holdings are, of course, inapposite to the above cases cited by Respondent.

In the *Joiner* case, the above well established precedents of this Court were challenged by the plaintiffs in light of certain more recent due process cases of this Court. The District Court found this argument unpersuasive. Plaintiffs also attempted to distinguish the above-cited cases on the ground that the City of Dallas was acting *administratively* and not legislatively when it decided to take plaintiffs' properties. Even though the plaintiffs were technically correct under Texas law, the Court rejected the argument because the power of eminent domain is a unique sovereign right and its "character cannot be changed by the label under which it is pursued." 380 F. Supp. at 771. Hence, even though the Power Siting Board makes its decision in an administrative, quasi-judicial context, the fundamental nature of that decision is not altered and the holdings of the above-cited cases make clear that the Board is under no Constitutional obligation to give Petitioner any notice of its proceedings.

In *Government of the Virgin Islands, supra,* the Court of Appeals overturned the District Court's holding that where the government decides to conduct a public hearing before deciding to condemn certain land, it must, in accordance with the due process clause of the Constitution, give personal notice of the hearing to those owners whose property is a potential target of the planned taking. The District Court reached its conclusion because

it viewed certain recent decisions of this Court as representing the current state of the law with regard to the requirements of notice and hearing when a person's property is at stake: "Thus although the older cases in the area of eminent domain have not been expressly overruled, the district court believed such to be the implicit result wrought by the more recent ones." 536 F. 2d at 570. The Court of Appeals overturned the District Court's holding on the ground that this Court reaffirmed its long standing holdings in the area of eminent domain when it affirmed the decision of the District Court in the *Joiner* case.

Hence, under a long and consistent line of rulings by this Court, it is clear that the Power Siting Board in determining where the line in question may be routed was under no Constitutional obligation to give Petitioner any notice of the hearing process for the route selection of that line.

CONCLUSION

For the reasons set forth above, it is clear that Petitioner has not presented this Court with an "important question of federal law which has not been settled by this Court" as required by Rule 17.1(c) of the Supreme Court Rules. To the contrary, the law as to the Constitutional issue is well settled. However, as pointed out above, there are several threshold flaws in Petitioner's arguments that eliminate the necessity to even reach the Constitutional issue presented. Hence, this Court should deny Petitioner's writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition were mailed by First Class, postage prepaid, this ____ day of October, 1982 to the following: Michael D. Rossi, Esq., Guarnieri & Secrest, 151 East Market Street, Warren, Ohio 44481, Counsel of Record for Petitioner; Thomas A. Kayuha, Esq., 76 South Main Street, Akron, Ohio 44308, Counsel of Record for Respondent, Ohio Edison Company.

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APPENDIX

OHIO REVISED CODE
STATUTES INVOLVED

Section 163.07 Notice to owners of property.

When the residence of the owners is known and is within this state, notice of the filing of a petition as provided in section 163.05 of the Revised Code shall be given to all such owners by serving a summons and a copy of such petition in the manner of service of summons in civil actions. When the residence of the owners is unknown, and as to all who cannot be served within the state, notice shall be given by publishing the substance of the petition, and a statement of the date of the filing thereof and of the date on and after which the matter may be heard, once a week for two consecutive weeks, in a newspaper of general circulation in the county, or shall be given by registered mail. When service is made by publication, section 2703.16 of the Revised Code shall be complied with.

Unless a person acquiring any interest in any property described in an appropriation petition after the filing thereof moves to be made an additional party defendant prior to the date that the case is set for the jury trial on compensation or to any journalization of a settlement entry, he shall be bound by the final judgment, without right of appeal except as to distribution, and shall receive such compensation as was awarded to his predecessor in interest to the extent that he has succeeded thereto.

Section 4906.04 Certificate for construction of major utility facility.

No person shall commence to construct a major utility facility in this state without first having obtained a

certificate for the facility. The replacement of an existing facility with a like facility, as determined by the power siting board, shall not constitute construction of a major utility facility. Such replacement of a like facility is not exempt from any other requirements of state or local laws or regulations. Any facility, with respect to which such a certificate is required, shall thereafter be constructed, operated, and maintained in conformity with such certificate and any terms, conditions, and modifications contained therein. A certificate may only be issued pursuant to Chapter 4906. of the Revised Code.

A certificate may be transferred, subject to the approval of the board, to a person who agrees to comply with the terms, conditions, and modifications contained therein.

Section 4906.06 Application for certificate; contents; publication of notice; amendment.

(B) Each application shall be accompanied by proof of service of a copy of such application on the chief executive officer of each municipal corporation and county and the head of each public agency, charged with the duty of protecting the environment or of planning land use, in the area in which any portion of such facility is to be located.

(C) Each applicant shall within seven days of the filing of the application give public notice to persons residing in the municipal corporations and counties entitled to receive notice under division (B) of this section, by the publication of a summary of the application in newspapers of general circulation in such area. Proof of such publication shall be filed with the board.

Section 4906.13 Exclusion from state or local jurisdiction.

No public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or initial operation of a major utility facility authorized by a certificate issued pursuant to Chapter 4906. of the Revised Code. Nothing herein shall prevent the application of state laws for the protection of employees engaged in the construction of such facility nor of municipal regulations that do not pertain to the location or design of, or pollution control and abatement standards for, a major utility facility for which a certificate has been granted under this chapter.

Section 4906.98 Prohibitions.

No person shall willfully construct a major utility facility without first obtaining a certificate.

No person shall willfully construct, operate, or maintain a major utility facility other than in compliance with the certificate he has obtained.

Section 4933.15 Appropriation of property by electric companies.

Any company organized for manufacturing, generating, selling, supplying, or transmitting electricity, for public and private use, may, for the purpose of making preliminary examinations and surveys, enter upon any land held by any individual or corporation, whether acquired by purchase, appropriation proceedings, or otherwise, unless such land is owned by and essential to the purposes of another corporation possessing the power of eminent domain, and may appropriate so much of such land, or any right or interest therein, including

any trees, edifices, or buildings thereon, as is deemed necessary for the erection, operation, or maintenance of an electric plant, including its generating stations, substations, switching stations, transmission and distribution lines, poles, towers, piers, conduits, cables, wires, and other necessary structures and appliances, or for rights of way over such land and adjacent lands for the purpose of access to any part of such land. The right of appropriation shall be exercised in the same manner provided by sections 163.01 to 163.22, inclusive, of the Revised Code.

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ALEXANDER L. STEVAS,
CLERK

No. 82-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OHIO, EX REL. HELEN EARNHART,
Petitioner,

v.

OHIO POWER SITING BOARD, *et al.*
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION FOR OHIO EDISON COMPANY

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED FOR REVIEW

Contrary to her assertions the Question Presented for Review fails to indicate that the Masury-Greenville 138 KV Transmission Line has now been built and operating and is located *not* upon the Petitioner's property but rather totally upon an existing highway right-of-way of the State of Ohio, pursuant to O.R.C. Sections 4931.01 and 4933.14. The Question should more appropriately be as follows:

> Whether a legislative determination by an administrative agency, in accordance with the state's statutory scheme, establishing the necessity for routing an electric transmission line which ultimately is placed on an existing public highway right-of-way violated the Fourteenth Amendment due process rights of an individual property owner abutting such right-of-way.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-542

STATE OF OHIO, EX REL. HELEN EARNHART,
Petitioner,

v.

OHIO POWER SITING BOARD, *et al.*
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF IN OPPOSITION FOR OHIO EDISON COMPANY

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case contains certain misstatements and omissions which need to be clarified for proper consideration of the issue presented by the Petition.

As part of Ohio Edison's continuing program to meet the electrical needs of its customers, the Ohio Power Siting Commission (hereafter known as the "Power Siting Board") issued an Opinion and Final Order granting a Certificate of Environmental Compatibility and Public Need with Conditions ("Certificate") on June 23, 1978 (Petition A-15), for this Respondent's Masury-Greenville 138 KV Transmission Line ("Line").

In reaching its decision, the Power Siting Board was required to take into account six defined considerations. Specifically, pursuant to O.R.C. Section 4906.10(A), the Power Siting Board found and determined:

> "(1) The basis of the need for the facility;
>
> (2) The nature of the probable environmental impact;
>
> (3) That the facility represents the minimum adverse environmental impact . . .;
>
> (4) . . . that such facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems; . . .
>
> (5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all regulations and standards adopted thereunder;
>
> (6) That the facility will serve the public interest, convenience and necessity."

On November 27, 1981 during the final stages of construction of the Line, Ohio Edison commenced a proceeding in the Court of Common Pleas of Trumbull County, Ohio, due in part to Petitioner's assault and threats upon Ohio Edison's employees (Case No. 81-1102). As the result of that proceeding, the Court of Common Pleas found and determined that Ohio Edison

> "has obtained a Certificate, . . . that the defendant [including Petitioner] acknowledged that Plaintiff met the Ohio statutory requirements in obtaining said certificate, . . . that said certificate entitled Plaintiff to install the line along the route authorized. . . . [that Ohio Edison] . . . be and hereby is permitted to complete construction of a 138 KV line along the west side of Miller Street, . . . and that Ohio Edison may do all work necessary, including the

trimming of trees within the public road right-of-way of Miller Street, to complete the construction of said line." (See Exhibit A hereto)

No appeal of these findings was taken by Petitioner, a named defendant in that proceeding, and a resident in one of the eleven houses along Miller Street (Petition 3).[1]

The Petitioner filed a request on January 6, 1982 with the Power Siting Board requesting that it suspend the operation and effect of Ohio Edison's Certificate until such time as she is given individual notice and an opportunity to participate in a hearing on the matter. Because the request was filed outside the filing requirements of O.R.C. Section 4903.10, the Power Siting Board denied the request under Order of August 27, 1982 (See Exhibit B hereto). Again no appeal of that Order was taken, and by virtue of O.R.C. Section 4903.11 it became a final Order.

Following the Supreme Court of Ohio's dismissal of the Petitioner's Complaint in Mandamus on June 2, 1982 (Petition 4, A-3), Ohio Edison completed construction of the Line placing it in commercial operation on August 31, 1982 pursuant to the terms and conditions of the Certificate and the Order of the Court of Common Pleas.

The proceeding before the Power Siting Board was not a condemnation of property, the Certificate making a

---

[1] Petitioner has alleged that the Line passes over her fee property because the fee property "extends to the centerline of Miller Street" (Petition 6). To the contrary, the Line is totally within the public road right-of-way as mandated by the Court of Common Pleas of Trumbull County, a determination made after notice and a hearing thereon (See Exhibit A hereto).

determination only as to the six defined statutory considerations heretofore noted.

ARGUMENT

1. A Properly Presented Constitutional Question Is Not Before The Court.

Ohio Edison argued in the Supreme Court of Ohio below that it should not reach the alleged constitutional question presented, because with respect to that question there was not an actual controversy[2] and other sound authority precluded issuance of a Writ of Mandamus. The proceeding below was an original action in Mandamus before the Supreme Court of Ohio, which summarily denied issuance of the Mandamus and dismissed the Complaint (See Petition A-3). It can only be concluded that the dismissal was founded upon sound principles precluding issuance of the Writ under Ohio law, with the Court finding that the Complaint failed to state a proper cause of action in Mandamus. Such a holding was appropriate entirely apart from the alleged constitutional question.

In its Motion to Dismiss in the Court below this Respondent presented a virtual litany of reasons why issuance of Mandamus was contrary to Ohio law. It argued, *inter alia*, that no extraordinary circumstances existed to justify issuance of the Writ, that Mandamus does not lie because the Power Siting Board is not under a clear legal duty to perform an official act, *State ex rel. Pressley* v. *Ind. Comm.*, 11 Ohio St. 2d 141 (1967); Mandamus may not be used to control the exercise of official or

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[2] In the Court below Ohio Edison challenged the contention of Petitioner that she "never received actual notice" of the proceeding before the Power Siting Board.

judicial discretion, *State ex rel. Shively* v. *Nicholas*, 151 Ohio St. 179 (1949); a complaint seeking an injunctive remedy to restrain and enjoin respondents rather than to compel respondents to perform a clear legal duty does not state a cause of action in Mandamus, *State ex rel. Pressley* v. *Ind. Comm.*, *Supra.*, *State ex rel. Stine* v. *McCaw*, 136 Ohio St. 41 (1939), Mandamus must not be issued when the petitioner has or had available a plain and adequate remedy at law, *State ex rel. Sibarco* v. *Berea*, 7 Ohio St. 2d 85 (1966); Mandamus may not be invoked as a substitute for the remedy of appeal, *State ex rel. Shively* v. *Nicholas*, *Supra.*; Mandamus does not lie to reverse an Order of the Power Siting Board, *Cf.*, *State ex rel. Cincinnati* v. *Miller*, 149 Ohio St. 45 (1948); Mandamus is barred by laches, *State ex rel. Bargahiser* v. *Bd. of Elections*, 14 Ohio St. 2d 129 (1968); *State ex rel. Friedlander* v. *Myers*, 128 Ohio St. 568 (1934); Mandamus should not be employed when to do so is against the public interest, 35 O. Jur. 2d *Mandamus* § 42; and Mandamus is inappropriate when the legal questions have become moot and issuance of the Writ would be useless or a vain act, *State ex rel. Ingerson* v. *Berry*, 14 Ohio St. 315 (1863); *State ex rel. Karam* v. *Cull*, 139 Ohio St. 415 (1942).

This Respondent notes additionally that Ohio law is in accord with decisions of this Court, which has held that the peremptory common-law writs including Mandamus are among the most potent weapons in the judicial arsenal and must be reserved for really extraordinary causes. *Will* v. *United States*, 389 U.S. 90 (1967); *Ex parte Fahey*, 332 U.S. 258 (1947). This Court has further held that Mandamus may not be used as a substitute for an appeal procedure prescribed by statute, *Roche* v. *Evaporated Milk Assoc.*, 319 U.S. 21 (1943), *Ex parte Fahey*, *Supra.*; right to issuance of the Writ must be clear and indisputable, *Bankers Life & Casualty Co.* v. *Holland*,

346 U.S. 379 (1953); *United States* v. *Duell*, 172 U.S. 576 (1899); Mandamus may not be employed to direct the exercise of judgment or discretion in a particular way, *Wilbur* v. *United States*, 281 U.S. 206 (1930); and Mandamus will not be granted if there is another legal remedy, *United States* v. *Duell, Supra.*

Petitioner herein elected to pursue a cause of action in the Court below which was fatally flawed procedurally and according to Ohio law was without merit. Petitioner failed to prosecute a timely appeal pursuant to Ohio law of the Power Siting Board's Certificate of June 23, 1978 (Petition A-15); failed to timely plead or bring an action for damages and properly raise the Constitutional issue in a court of competent jurisdiction; failed to appeal the issuance of an injunction against Petitioner by the Court of Common Pleas for Trumbull County, Ohio (Exhibit A hereto), in a proceeding initiated by this Respondent; and failed to prosecute an appeal of the Power Siting Board's Finding and Order of June 28, 1982, journalized August 27, 1982 (Exhibit B hereto), denying the request of Petitioner for an order suspending the operation and effect of the Certificate for the Masury-Greenville 138 KV Transmission Line. Assuming for the purpose of argument that there had been a taking or trespass upon the property of Petitioner, an Ohio Court of Common Pleas would have afforded Petitioner an adequate legal remedy. Petitioner herein has simply failed to pursue her claim in a proper manner and in an appropriate proceeding.

There being substantial state grounds independent of the federal question sufficient to sustain the judgment of the court below, there is no basis for the exercise of jurisdiction herein by this Court. *Buck* v. *California*, 343 U.S. 99 (1952); *Lynch* v. *New York*, 293 U.S. 52 (1934).

2. Petitioner Has Not Presented A Substantial Federal Question And This Is Not A Certworthy Case, The Question Having Been Heretofore Settled By This Court.

The instant Petition has presented no special and important reasons for granting the Writ in this case, as required by this Court's Rule 17. Moreover, none of the conditions for allowance of the Writ set forth in Rule 17 apply here. Petitioner has not demonstrated that the decision entered by the Supreme Court of Ohio is in conflict with the decision of another state court of last resort. Rule 17(1)(b). The Supreme Court of Ohio has not decided an important question of federal law which has not been but should be settled by this Court. Rule 17(1)(c). Nor has the Supreme Court of Ohio decided a federal question in a way in conflict with applicable decisions of this Court. Rule 17(1)(c).

Petitioner challenges the authority of an administrative agency authorized by the General Assembly of Ohio to determine the environmental compatibility and necessity for construction of major utility facilities in the State of Ohio. Petitioner concedes that "herein, there are no eminent domain proceedings" (Petition 5), but theorizes that decisions of this Court would require the administrative agency to provide personal notice and an opportunity to be heard prior to the agency's legislative determination of the necessity for the location of such facilities.

Clearly, this is not the law and this Court has previously confronted this precise question, holding that landowners do *not* have the right to participate in the legislative decision-making process or to litigate on federal constitutional grounds the decision to condemn private property. This Court has squarely held that "the necessity and expediency of the taking of property for public use are

legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276 (1925). *Accord, Georgia* v. *City of Chattanooga*, 264 U.S. 472 (1924); *Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668 (1923); *Bragg* v. *Weaver*, 251 U.S. 57 (1919); *Sears* v. *City of Akron*, 246 U.S. 242 (1918); *See also Shoemaker* v. *United States*, 147 U.S. 282 (1893). More recently this Court has reaffirmed that no hearing need be provided by the state prior to its determination of the necessity for the condemnation of land. *Joiner* v. *City of Dallas*, 419 U.S. 1042, *aff'g mem.* 380 F. Supp. 754 (N.D. Tex. 1974) (per curiam) (three-judge court).

Of course, it should not be overlooked that the procedures in Ohio before the Power Siting Board have nothing whatsoever to do with the taking of private property or the fixing of compensation therefor. The Power Siting Board has no eminent domain authority, the utilities in Ohio having such power to appropriate any land or interest as necessary for the operation of their facilities pursuant to O.R.C. Section 4933.15 and Chapter 163. Indeed, in those instances in which a public utility cannot agree with an owner on just compensation for affected property, that is, when an easement is necessary for placement of facilities, such utility must independently commence an appropriation proceeding according to Ohio law with all personal notice provisions being applicable. See O.R.C. Section 163.07. It is before an Ohio Court of Common Pleas that a property owner is afforded actual notice and a hearing to establish just compensation for a taking of private property. See. O.R.C. Section 163.09. The proceeding before the Power Siting Board to determine the necessity of a major utility facility is of a much more limited nature. Pursuant to the rulings of this Court

hereinabove cited, the Power Siting Board had no constitutional obligation to give Petitioner personal notice of the hearing that merely considered the necessity of the utility facility at issue.

Petitioner has simply presented a question which was previously presented to this Court and has been settled. Petitioner's due process argument is frivolous. Accordingly there is no basis for allowance of the Writ of Certiorari herein.

3. There Has Been No Deprivation Of A Significant Property Interest Without Due Process Of Law.

Assuming *arguendo* that the Constitutional question herein was properly before this Court, and further assuming *arguendo* that Petitioner has presented a cert-worthy case concerning a substantial federal question, Petitioner has failed to establish that she was denied due process of law because at no time has Petitioner been deprived of a significant or legally protected property interest.

It is axiomatic that property rights protected by the Constitution are defined by reference to state law or common law. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972). Pursuant to Ohio law Petitioner had no cognizable property interest which is protected. As noted in the Counterstatement of the Case, the subject Line is constructed totally in a public road right-of-way of Miller Street in accordance with the Order of the Court of Common Pleas for Trumbull County, Ohio (See Exhibit A).[3] The Ohio General Assembly has granted permission

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[3] Petitioner concedes that the Line was constructed along "a public right-of-way traversing Petitioner's residential real property abutting Miller Street" (Petition 3).

to electric light and power companies to construct lines upon and along any of the public roads and highways of Ohio if such facilities do not incommode the public use of the roads and highways. O.R.C. Sections 4931.01 and 4933.14; 19 O. Jur. 2d *Electricity* § 10. It was pursuant to these statutory provisions that the Line was built and is now operating upon fee property of the State of Ohio which happens to abut the front edge of Respondent's property. As such, the Line does not constitute an additional burden or servitude upon the property of Petitioner under Ohio law. *Ziegler* v. *Ohio Water Service Co.*, 18 Ohio St. 2d 101 (1969); *Franko* v. *Ohio Edison Co.*, 71 Ohio Law Abs. 221 (Ct. App. Mahoning County 1954), *appeal dismissed*, 162 Ohio St. 244 (1954); *Ohio Postal Telephone Co.* v. *Smith*, 128 Ohio St. 400 (1934); *Smith* v. *Central Power Co.*, 103 Ohio St. 681 (1921).

Nothing in the Power Siting Board's procedures concerns an analysis of the impact or impairment upon an individually affected property owner but rather this has been reserved for judicial resolution pursuant to O.R.C. Chapter 163.

CONCLUSION

For all of the reasons set forth hereinabove, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition were mailed by First Class, postage prepaid, this 3rd day of November, 1982 to the following:

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APPENDIX

EXHIBIT A

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

Case No. 81-CV-1102

OHIO EDISON COMPANY

Plaintiff

v.

MIKE DONATO, *et al.*

Defendants

JUDGMENT

This matter came before the court on the motion of plaintiff for a preliminary injunction in order to install a 138 KV Line in Brookfield Township pursuant to a Certificate of Environmental Compatability in Public Need from the Ohio Power Siting Commission and the court being fully advised in the premises and upon consideration of the opening statements of counsel finds; that plaintiff has obtained a certificate of environmental compatability and public need from the Ohio Power Siting Commission; that the defendants acknowledged that plaintiff met the Ohio statutory requirements in obtaining said certificate; and that said certificate entitled plaintiff to install the line along the route authorized by said certificate.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, by the court, that the Ohio Edison Company, pursuant to the authority granted in a Certificate of Environmental Compatability and Public Need from the Ohio Power Siting Commission, be and hereby is permitted to complete construction of a 138 KV Line along the west side of Miller Street in Brookfield Township; that the residents of Miller Street, the Brookfield Township Trustees, and others who may have knowledge of this order are here by restrained and prohibited from physically obstructing or blocking Ohio Edison, its crews

and employees in completing the installation of said line; that Ohio Edison may do all work necessary, including the trimming of trees within the public road right-of-way of Miller Street, to complete the construction of said line; and that Ohio Edison shall post a bond in the amount of $20,000.00 with the Trumbull County Clerk of Common Pleas prior to the commencement to the completion of construction of said line on Miller Street.

/s/ DAVID M. GRIFFITH
Judge

COURT OF COMMON PLEAS

County of Trumbull, State of Ohio

No. 81-CV-1102

OHIO EDISON CO.

AGAINST

MIKE DONATO, ETAL

CERTIFIED COPY

I, VIOLET CAMPANA WHITMAN, Clerk of the Court of Common Pleas, hereby certify that the within is a true copy of the original

JUDGMENT

FILED DECEMBER 17th 19 81

in the above entitled case.

VIOLET CAMPANA WHITMAN, Clerk

By Violet C. Whitman Deputy

Certified DECEMBER 18th 19 81

EXHIBIT B

THE POWER SITING BOARD
OF
THE STATE OF OHIO

CASE NO. 02-00005

In the Matter of Ohio Edison Company's Certificate of Environmental Compatability and Public Need for its Masury-Greenville Transmission Line.

FINDING AND ORDER DENYING THE REQUEST OF MRS. HELEN EARNHART FOR AN ORDER SUSPENDING THE OPERATION AND EFFECT OF THE MASURY-GEEENVILLE CERTIFICATE AND A HEARING ON THE ROUTE SELECTION OF THE MASURY-GREENVILLE LINE.

FINDING AND ORDER

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OHIO POWER SITING BOARD

The Board having considered the request of Mrs. Helen Earnhart for an order suspending the operation and effect of the Masury-Greenville 138 KV Transmission Line and other relief, finds:

(1) That on June 23, 1978, the Power Siting Board issued a Certificate of Environmental Compatability and Public Need to Ohio Edison Company for its Masury-Greenville 138 KV Transmission Line.

(2) That on January 6, 1982, Mrs. Helen Earnhart filed a letter with the Board requesting that the Board suspend the operation and effect of Ohio Edison Company's Certificate for the Masury-Greenville Line until such time as Mrs. Earnhart is given individual notice of Ohio Edison Company's Application for the Masury-Greenville Line and given an oppor-

tunity to participate in a hearing on said Application.

(3) That the request was based upon Mrs. Earnhart's status as an "affected area" resident and Mrs. Earnhart's contention that the notice provisions of R.C. Chapter 4906 were constitutionally deficient.

(4) That on January 7, 1982, Mrs. Helen Earnhart filed a Complaint in Mandamus against the Board in the Ohio Supreme Court requesting among other things that the Court suspend the operation and effect of Ohio Edison Company's Masury-Greenville Certificate of Environmental Compatability and Public Need.

(5) That in said Complaint, Mrs. Earnhart requested an alternative writ for the above described relief.

(6) That on January 19, 1982, Mrs. Earnhart supplemented her January 6, 1982 filing, citing R.C. 4906.06(D) as authority for the Board to suspend Ohio Edison Company's Masury-Greenville Certificate.

(7) That Ohio Edison Company filed a response to Mrs. Earnhart's January 6, 1982 filing on January 19, 1982. In its filing, Ohio Edison argued that under R.C. Chapter 4906 and R.C. 4903.10, the Board lacked authority to suspend Ohio Edison Company's Certificate and lacked jurisdiction to grant any rehearing.

(8) That on January 20, 1982, the Ohio Supreme Court allowed the alternative writ requested by Mrs. Earnhart.

(9) That on January 25, 1982, Ohio Edison filed a response to Mrs. Earnhart's January 19, 1982 filing. Ohio Edison pointed out that R.C. 4906.06(D) is relevant only where there has been a failure of service or public notice and that Mrs. Earnhart conceded that the notice provisions of R.C. Chapter 4906 had been complied with.

(10) That consistent with the Supreme Court's January 20, 1982 decision, the Board issued a *Finding and Order* on January 26, 1982 suspending the operation

and effect of Ohio Edison Company's Masury-Greenville Transmission Line certificate "until final disposition of *Earnhart* v. *PSB*, Case No. 82-28," by the Court.

(11) That on February 3 and 4, 1982, Ohio Edison Company and the Board filed separate motions requesting that the Supreme Court dismiss Mrs. Earnhart's Complaint.

(12) That on June 2, 1982, the Court sustained the Board's and Ohio Edison Company's request to dismiss Mrs. Earnhart's Complaint, and dismissed the case.

(13) That on June 18, 1982, the Board issued a *Finding and Order* vacating its January 26, 1982 *Finding and Order* in this matter.

(14) That because of the pending Mandamus action in the Ohio Supreme Court in which Mrs. Earnhart requested the same relief as she requested before the Board, Mrs. Earnhart's January 6, 1982 request was not placed on the Board's agenda until the June 28, 1982 meeting.

It is therefore,

ORDERED, that because Mrs. Earnhart's January 6, 1982 request was filed outside the 30-day filing period of R.C. 4903.10 for rehearings, the Board is without jurisdiction to grant the relief Mrs. Earnhart has requested. In addition, the Board notes that Mrs. Earnhart concedes that all statutorily required notice was given in this case.

It is further

ORDERED, that copies of this *Finding and Order* be sent to Counsel for Mrs. Helen Earnhart, Counsel for Ohio Edison and Counsel for the Pennsylvania Public Utilities Commission. Copies shall be made available to all other interested persons upon request.

THE OHIO POWER SITING BOARD

Issued the 28th day of June, 1982
at Columbus, Ohio

Entered in the Journal
August 27, 1982

A true copy

/s/ ROBERT V. STAMPER
Robert V. Stamper
Secretary

/s/ JON F. KELLY
Jon F. Kelly, Chairman and Chairmen of
the Public Utilities Commission of Ohio

/s/ JOHN H. ACKERMAN
John H. Ackerman, M.D., Board Member
and Director of the Ohio Department of Health

/s/ JAMES A. DUERK
James A. Duerk, Board Member and
Director of the Ohio Department of Economic
and Community Development

/s/ FRANCIS J. JANKOWSKI
Francis J. Jankowski, Board Member and
Public Representative

/s/ Wayne S. Nichols, Board Member and
Director of the Ohio Environmental Protection
Agency

/s/ Robert W. Teater, Board Member and
Director of the Ohio Department of Natural
Resources

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing *Finding and Order* by mailing a copy, certified mail, return receipt requested, postage prepaid, this 31st of August, 1982 to:

MICHAEL D. ROSSI
GUARNIERI & SECREST
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Warren, Ohio 44481

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Chief Counsel
Pennsylvania Public Utility Commission
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30 East Broad Street
Columbus, Ohio 43215

/s/ ROBERT V. STAMPER
Robert V. Stamper
Secretary

CHAPTER 163

§ 163.01 Definitions.

As used in sections 163.01 to 163.22, inclusive, of the Revised Code:

(A) "Public agency" means any governmental corporation, unit, organization, or officer authorized by law to appropriate property in the courts of this state. "Private agency" means any other corporation authorized by law to appropriate property in the courts of this state. "Agency" includes any public agency or private agency.

(B) "Court" includes the court of common pleas and the probate court of any county in which the property sought to be appropriated is located in whole or in part.

(C) "Owner" includes any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated.

(D) "Real property," "land," or "property" includes any estate, title, or interest in any real property which is authorized to be appropriated by the agency in question, unless the context otherwise requires.

HISTORY: 131 v 179. Eff 1-1-66.

§ 163.02 Appropriation of real property.

All appropriations of real property, except as otherwise authorized by this section, shall be made pursuant to sections 163.01 to 163.22 of the Revised Code. The director of transportation may appropriate any interest in real property pursuant to sections 163.01 to 163.22 of the Revised Code or as otherwise provided by law.

Where so authorized by sections 6101.01 to 6101.84 of the Revised Code, a conservancy district may appropriate real property by procedures prescribed in such sections.

Where so authorized by sections 6115.01 to 6115.79 of the Revised Code, a sanitary district may appropriate real property by procedures prescribed in such sections.

HISTORY: 131 v 180 (Eff 1-1-66); 135 v H 200. Eff 9-28-73.

§ 163.03 Entry upon real property; notice; damages.

Any agency may, upon the notice prescribed in this section, prior to or subsequent to the filing of a petition pursuant to section 163.05 of the Revised Code, enter upon any lands, waters, and premisses for the purpose of making such surveys, soundings, drillings, appraisals, and examinations as are necessary or proper for the purpose of the agency under sections 163.01 to 163.22, inclusive, of the Revised Code, and such entry shall not constitute a trespass. Notice of such proposed entry shall be given to the owner or the person in possession by such means as are reasonably available not less than forty-eight hours nor more than thirty days prior to the date of such entry.

The agency shall make restitution or reimbursement for any actual damage resulting to such lands, waters, and premises and to improvements or personal property located in, on, along, over, or under such lands, waters, and premises, as a result of such activities. If the parties are unable to agree upon restitution or other settlement, damages are recoverable by civil action to which the state or agency hereby consents.

HISTORY: 131 v 180. Eff 1-1-66.

§ 163.04 Appropriation.

Appropriations shall be made only after the agency is unable to agree, for any reason, with the owner, or if more than one, any owner, or his guardian or trustee, or when any owner is incapable of contracting in person or by agent and has no guardian or trustee, or is unknown, or is not a resident of this state, or his residence is unknown to the agency and cannot with reasonable diligence be ascertained.

HISTORY: 131 v 180. Eff 1-1-66.

§ 163.05 Petition for appropriation.

An agency which has met the requirements of section 163.04 of the Revised Code, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or continguous parcels in a single common ownership, or interest or right therein. The petition of a

private agency shall be verified as in a civil action and all petitions shall contain:

(A) A description of each parcel of land or interest or right therein sought to be appropriated, such as will permit ready identification of the land involved;

(B) In the case of a private agency, a statement that such appropriation is necessary, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;

(C) A statement of the purpose of the appropriation;

(D) A statement of the estate or interest sought to be appropriated;

(E) The names and addresses of the owners, so far as they can be ascertained;

(F) A statement showing requirements of section 163.04 of the Revised Code have been met;

(G) A prayer for the appropriation.

In the event of the appropriation of less than the fee of any parcel or of a fee in less than the whole of any parcel of property, the agency shall either make available to the owner or shall file in the office of the county engineer, a description of the nature of the improvement or use which requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement. A set of highway construction plans shall be acceptable in providing such description for the purposes of the preceding sentence in the appropriation of land for highway purposes.

HISTORY: 131 v 181 (Eff 1-1-66); 132 v H 132, § 1. Eff 8-8-67.

§ 163.06 Deposit with court; appraisal of structures.

(A) A public agency, other than an agency appropriating property for the purposes described in division (B) of this section, which qualifies pursuant to Section 19 of Article I, Ohio Constitution, may deposit with the court at the time of filing the petition the value of such property

appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. The right of possession upon deposit as provided in this division shall not extend to structures.

(B) A public agency appropriating property for the purpose of making or repairing roads which shall be open to the public, without charge, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and stated in an attached declaration of intention to obtain possession and thereupon take possession of and enter upon the property appropriated, including structures situated upon the land appropriated for such purpose of situated partly upon the land appropriated therefor and partly upon adjoining land, so that such structures cannot be divided upon the line between such lands without compensation to any owner of land appropriated under this division shall assess the value thereof in accordance with section 163.14 of the Revised Code. The owner or occupant of such structures shall vacate the same within sixty days after service of summons as required under section 163.07 of the Revised Code, at no cost to the appropriating agency, after which time the agency may remove said structures. In the event such structures are to be removed before the jury has fixed the value of the same, the court, upon motion of the agency, shall:

(1) Order appraisals to be made only by three persons, one to be named by the owner, one by the county auditor, and one by the agency. Such appraisals may be used as evidence by the owner or the agency in the trial of said case but shall not be binding on said owner, agency, or the jury, and the expense of said appraisals shall be approved by the court and charged as costs in said case.

(2) Cause pictures to be taken of all sides of said structures;

(3) Compile a complete description of said structures, which shall be preserved as evidence in said case to which the owner or occupants shall have access.

(C) Any time after the deposit is made by the public agency under division (A) or (B) of this section, the owner may apply to the court to withdraw the deposit, and such withdrawal shall in no way interfere with the action except that the sum so withdrawn shall be deducted from the sum of the final verdict or award. Upon such application being made the court shall direct that the sum be paid to such owner subject to the rights of other parties in interest provided such parties make timely application as provided in section 163.18 of the Revised Code. Interest shall not accrue on any sums withdrawable as provided in this division.

HISTORY: 131 v 181 (Eff 1-1-66); 132 v H 1, § 1 (Eff 2-21-67); 132 v H 132, § 1 (Eff 8-8-67); 132 v H 188, § 1. Eff 8-8-67.

§ 163.07 Notice to owners of property.

When the residence of the owners is known and is within this state, notice of the filing of a petition as provided in section 163.05 of the Revised Code shall be given to all such owners by serving a summons and a copy of such petition in the manner of service of summons in civil actions. When the residence of the owners is unknown, and as to all who cannot be served within the state, notice shall be given by publishing the substance of the petition, and a statement of the date of the filing thereof and of the date on and after which the matter may be heard, once a week for two consecutive weeks, in a newspaper of general circulation in the county, or shall be given by registered mail. When service is made by publication, section 2703.16 of the Revised Code shall be complied with.

Unless a person acquiring any interest in any property described in an appropriation petition after the filing thereof moves to be made an additional party defendant prior to the date that the case is set for the jury trial on compensation or to any journalization of a settlement entry, he shall be bound by the final judgment, without right of appeal except as to distribution, and shall receive such compensation as was awarded to his predecessor in interest to the extent that he has succeeded thereto.

HISTORY: 131 v 183. Eff 1-1-66.

§ 163.08 Answer by property owner to petition.

Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation. An answer shall be served in accordance with Civil Rule 12. If the agency involved in the action is a private agency, no more than one extension of the time authorized by Civil Rule 12 for serving an answer shall be granted pursuant to Civil Rule 6, and that extension shall not exceed thirty days.

* HISTORY: 139 v S 61. Eff 8-25-81.

§ 163.09 Valuation of property taken; how determined.

(A) If no answer is filed pursuant to section 163.08 of the Revised Code, nor approval ordered by the court to a settlement of the rights of all necessary parties, the court on motion of a public agency shall declare the value of the property taken and the damages, if any, to be as set forth in any document properly filed with the clerk of courts by the public agency. In all other cases the court shall fix a time, within twenty days from the last date that such answer could have been filed, for the assessment of compensation by a jury.

(B) When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear

such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. If as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. An order of the court in favor of the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal. If a public agency has taken possession prior to such order and such order, after any appeal, is against the agency on any of such questions, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (B) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(C) When an answer is filed pursuant to action 163.08 of the Revised Code, and none of the matters set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court may, with the consent of the parties, order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

HISTORY: 131 v 184 (Eff 1-1-66); 132 v H 132 (Eff 8-8-67); 132 v H 188 (Eff 8-8-67); 133 v H 1. Eff 3-1-69.

§ 163.10 Jury selection; qualifications.

The assessment of compensation may be made at a regular or special term of court. The jury shall be selected from the jurors drawn as prescribed in sections 2313.19 to 2313.26 of the Revised Code, and qualified as in civil actions. However, it shall be grounds for challenge for cause if a juror has served in two appropriation trials in the current term of court. Depositions may be taken as in other civil cases, subject to the requirements of section 5501.21 of the Revised Code. Depositions of the officers, agents, or employees of the agency or owner shall be taken as on cross-examination. No evidence may be adduced or elicited in depositions as to value or appraisals on cross-examination, unless raised by direct examination.

HISTORY: 131 v 185 (Eff 1-1-66); 135 v H 200. Eff 9-28-73.

§ 163.11 Infant or incompetent owners of property; guardian ad litem to be appointed.

If it appears that any of the owners is an infant or otherwise incompetent, and has no guardian, a guardian ad litem shall be appointed in his behalf.

HISTORY: 131 v 185. Eff 1-1-66.

§ 163.12 View of premises; defects may be amended.

A view of the premises to be appropriated shall be ordered by the court when demanded by a party to the proceedings. The owners shall open and close the case.

The court may amend any defect or informality in proceedings under sections 163.01 to 163.22, inclusive, of the Revised Code. The court may cause new parties to be added, and direct such further notice to be given to a party in interest as the court deems proper.

No part of the pleadings, other than the petition, shall be read or exhibited to the jury.

HISTORY: 131 v 185. Eff 1-1-66.

§ 163.13 Determination of rights.

No delay in the proceedings shall be occasioned by doubt as to the ownership of any property, or as to the interest of

the respective owners, but in such cases the court may require the retention of the deposit or award or such portion thereof as the court deems appropriate, until the rights of the respective parties have been determined.

HISTORY: 131 v 186. Eff 1-1-66.

§ 163.14 Jury verdict; how determined.

In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners. When a building or other structure is on the property appropriated or when a building or other structure is situated party upon the land appropriated and party upon adjoining land so that the structure cannot be divided upon the line between such lands without manifest injury thereto, the jury, in assessing compensation to any owner of the land, shall assess the value thereof, as part of the compensation. The title to said structure shall vest in the agency which shall have the right to enter upon the adjoining land upon which any part of the structure is located for the purpose of removing said structure therefrom, after deposit in accordance with the verdict. Such removal shall be made within ninety days after taking title to the property appropriated; provided, that the court may extend removal time upon such conditions as the court requires.

The verdict shall be signed by at least three-fourths of the members of the jury.

If a jury is discharged without rendering a verdict, another shall be impaneled at the earliest convenient time and shall make the inquiry and assessment.

HISTORY: 131 v 186 (Eff 1-1-66); 132 v H 132, § 1. Eff 8-8-67.

§ 163.15 When agency entitled to possession; transmission of final journal entry.

As soon as the agency pays to the party entitled thereto or deposits with the court the amount of the award and the

costs assessed against the agency, it may take possession; provided, that this shall not be construed to limit the right of a public agency to enter and take possession, as provided in section 163.06 of the Revised Code. When the agency is entitled to possession the court shall enter an order to such effect upon the record, and, if necessary, process shall be issued to place the agency in possession. Whenever a final journal entry in an appropriation proceeding, granting to this state a fee title or any lesser estate or interest in real property is filed and journalized by the clerk of courts, the clerk of courts shall forthwith transmit to the county auditor a certified copy of said final journal entry who shall transfer the property on his books and transmit said entry with proper endorsement to the county recorder for recording. The costs of filing such final journal entry with the county auditor and the county recorder shall be taxed as costs in the appropriation proceedings the same as other costs are taxed under section 163.16 of the Revised Code.

HISTORY: 131 v 186 (Eff 1-1-66); 132 v S 38, § 1. Eff 4-29-68.

§ 163.16 Payment of costs.

The court costs, including jury fees, of any proceeding shall be paid as the court directs, except as may be provided for in cases of abandonment pursuant to section 163.21 of the Revised Code. The agency may offer to confess judgment in accordance with sections 2311.14 to 2311.20, inclusive, of the Revised Code, for the amount to be stated and the court costs then made in favor of any owner who in any manner enters an appearance or upon whom service has been made. If such owner refuses to accept such offer and as a result of the trial does not receive more, he shall pay all court costs accruing after the offer.

HISTORY: 131 v 187. Eff 1-1-66.

§ 163.17 Interest payable on verdict.

Where the agency has the right to take possession of the property before the verdict upon payment into court of a deposit, and a portion of said deposit may be withdrawn immediately by the owner, the amount of the verdict which exceeds the portion of the deposit withdrawable

shall be subject to interest from the date of taking to the date of actual payment of the award.

Where the agency has no right to take possession of the property before the verdict, if the award is not paid to the owner or deposited in court within twenty-one days after journalization of the verdict, interest thereafter shall accrue, except that where the owner appeals, interest shall not accrue until the agency takes possession.

If the owner appeals and is granted a larger award, interest shall be paid on the additional amount awarded from the date of taking possession to the date of actual payment or date of deposit with immediate right of withdrawal.

If the agency wishes to appeal, it may require the deposit to remain with the court pending final disposition of the case provided it pays interest on the final award from date of taking possession to the date the money is actually paid or made available to the owner; provided, the owner may withdraw the entire award upon posting an appropriate refund bond set by the court; and provided, that where a building or other structure is taken, the court may, on application of the owner, permit the owner to withdraw a reasonable portion of the award allocable to the building without giving bond.

§ 163.18 Distribution of deposit or award; notice to owners.

At the time the agency makes a deposit or pays into court the jury award, the clerk of courts shall give notice by ordinary mail of such payment to the counsel of record of each owner and to the known address of owners not represented. Thereupon any owner may file with the court a motion for distribution. After reasonable notice to all parties and to any additional interested parties who become known to the court, the court shall hear evidence as to the respective interests of the owners in the property and may make distribution of the deposit or award accordingly.

HISTORY: 131 v 188. Eff 1-1-66.

§ 163.19 Appeal; right to use property not affected.

Subject to sections 163.07 and 163.09 of the Revised Code, any party may prosecute appeals as in other civil actions from the judgment of the court. The trial court upon proper terms may suspend the execution of any order, but in all cases where the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, the right to take and use the property appropriated shall not be affected by such review by the appellate courts.

HISTORY: 131 v 188. Eff 1-1-66.

§ 163.20 Appropriation of previously appropriated property.

An agency may appropriate in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code, any property in which an interest has been appropriated, in order to perfect title in itself.

HISTORY: 131 v 188. Eff 1-1-66.

§ 163.21 Proceedings may be abandoned within ninety days; payment of fees and expenses.

(A) The agency, if it has not taken possession of the property appropriated, may, at any time not later than ninety days after the final determination of the cause, abandon the proceedings.

(B) In all cases of abandonment as set forth in division (A) of this section, the court shall enter judgment against the agency for costs, including jury fees, and in favor of any owner, for the following items which have been incurred, for such amounts as the court deems just;

(1) Witness fees, including expert witness fees;

(2) Attorney fees;

(3) Other actual expenses.

HISTORY: 131 v 189. Eff 1-1-66.

§ 163.22 Proceedings to be governed by applicable civil law.

All proceedings brought under sections 163.01 to 163.22, inclusive, of the Revised Code, shall be governed by the law applicable in civil actions in the court of common pleas except as otherwise provided in such sections. Such proceedings shall be advanced as a matter of immediate public interest and concern and shall be heard by the court at the earliest practicable moment.

HISTORY: 131 v 189 (Eff 1-1-66); 132 v H 1, § 1. Eff 2-21-67.

§ 4903.10 Rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in said proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the proceeding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers said order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in said application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order shall, unless otherwise ordered by the commission, be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of

such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by registered mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thrity days from the date of filing thereof, it is denied by operation of law.

Where the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, which will be taken, but it shall not upon such rehearing take any evidence which, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by viture of the original order piror to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of said order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

HISTORY: 125 v 274 (Eff 10-2-53); 129 v 1610. Eff 10-

§ 4903.11 [Proceeding deemed commenced.]

No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing. An order denying an application for rehearing or an order made after a rehearing shall be served forthwith by registered mail upon all parties who have entered an appearance in the proceeding.

HISTORY: 125 v 274(276). Eff 10-2-53. Analogous to former RC § 4903.11 (GC § 614-43) [102 v 561].

§ 4906.10 Guidelines for granting or denying certificate; facility must comply with air, water, and solid waste requirements; facility subject to enforcement and monitoring powers of director of environmental protection.

(A) The power siting commission shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the commission considers appropriate. The certificate shall be conditioned upon the facility being in compliance with standards and regulations adopted under Chapters 3701., 3734., and 6111. of the Revised Code. The period of initial operation, under a certificate, shall expire two years after the date on which electric power is first generated by the facility. During the period of initial operation the facility shall be subject to the enforcement and monitoring powers of the director of environmental protection under Chapters 3704., 3734., and 6111. of the Revised Code and to the emergency provisions thereunder. If a major utility facility constructed in accordance with the terms and conditions of its certificate is unable to operate in compliance with all applicable requirements of state laws, regulations, and standards pertaining to air pollution, such facility may apply to the director of environmental protection for a conditional operating permit under division (G) of section 3704.03 of the Revised Code and the regulations adopted thereunder. The operation of a major utility facil-

ity in compliance with such a conditional operating permit is not in violation of its certificate. After the expiration of the period of initial operation of a major utility facility, such facility shall be under the jurisdiction of the environmental protection agency, and shall comply with all laws, regulations, and standards pertaining to air pollution, water pollution, and solid waste disposal.

The commission shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the commission, unless it finds and determines:

(1) The basis of the need for the facility;

(2) The nature of the probable environmental impact;

(3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In case of an electric transmission line that such facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems; and that such facilities will serve the interest of electric system economy and reliability;

(5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all regulations and standards adopted thereunder;

(6) That the facility will serve the public interest, convenience, and necessity.

§ 4931.01 Lines shall not incommode the public. (GC § 9180)

A telegraph company or any person may construct telegraph lines upon and along any of the public roads and highways, and across any waters, within this state, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines. Such lines shall be constructed so as not to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of such

waters. This section does not authorize the erection of a bridge across any waters of this state.

HISTORY: GC § 9180; RS § 3461-1; 45 v 34, § 1. Eff 10-1-53.

§ 4933.14 Electric light, power, and automatic package carrier companies (GC § 9192)

Except section 4931.08 of the Revised Code, sections 4931.01 to 4931.23, inclusive, and 4933.13 to 4933.16, inclusive, of the Reivsed Code, apply to companies organized for supplying public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and to an automatic package carrier. Except as provided by section 4931.08 of the Revised Code, every such company shall have the powers and be subject to the restrictions prescribed for telegraph companies by sections 4931.01 to 4931.23, inclusive, of the Revised Code.

HISTORY: GC § 9192; RS § 3471a; 92 v 204; 84 v 7. Eff 10-1-53.

§ 4933.15 Appropriation of property by electric companies.

Any company organized for manufacturing, generating, selling, supplying, or transmitting electricity, for public and private use, may, for the purpose of making preliminary examinations and surveys, enter upon any land held by any individual or corporation, whether acquired by purchase, appropriation proceedings, or otherwise, unless such land is owned by and essential to the purposes of another corporation possessing the power of eminent domain, and may appropriate so much of such land, or any right or interest therein, including any trees, edifices, or buildings thereon, as is deemed necessary for the erection, operation, or maintenance of an electric plant, including its generating stations, substations, switching stations, transmission and distribution lines, poles, towers, piers, conduits, cables, wires, and other necessary structures and appliances, or for rights of way over such land and adjacent lands for the purpose of access to any part of such land. The right of appropriation shall be exercised in

the same manner provided by sections 163.01 to 163.22, inclusive, of the Revised Code.

HISTORY: GC § 9192-1; 111 v 182; 131 v 1199. Eff 1-1-66.